Supreme Court, U.S.
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Case No. 94-1463

IN THE

Supreme Court of the United States

October Term, 1994

JESSE L. NIPPER, et al.,

Petitioners,

vs.

JIM SMITH,
Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Section 2 of the Voting Rights Act, Florida's interests in maintaining a partial "Missouri Plan" involving at-large elections for trial judges and merit selection for filling vacancies, are sufficiently strong as to outweigh, as a matter of law, whatever evidence of vote polarization petitioners may have shown below?

2. Whether the Eleventh Circuit's particularized holding as to the weight accorded Florida's partial "Missouri Plan" for judicial selection conflicts with precedent of this Court, and other federal circuit and district courts?

3. Whether the Eleventh Circuit's decision erroneously extends the "benchmark" theory of *Holder v. Hall,* 114 S.Ct. 2581 (1994), so as to preclude a Section 2 remedy in the case *sub judice.*

4. Whether, as a result of the Eleventh Circuit's decision, there remain unresolved issues of national importance regarding the appropriate standards for evaluating a Section 2 vote dilution challenge to Florida's partial "Missouri Plan" and the role of Florida's interests in that evaluation.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition to the petition for writ of certiorari establishes that petitioners' argument is fundamentally flawed because it overlooks (1) this Court's role in reviewing judgments rather than statements in opinions, and (2) the fact that the distilled holding of the Eleventh Circuit is consistent with *Houston Lawyers' Association.*

Because this Court reviews judgments, the State may properly assert any grounds supportive of the Eleventh Circuit's judgment. The Eleventh Circuit's decision is that Florida's interests in maintaining its partial "Missouri Plan," involving at-large elections and merit selection nominating commission system for filling vacancies in the state's trial judiciary, as a matter of law, outweighs petitioners' vote polarization evidence submitted at trial. This particularized fact-based, intensely localized determination precludes any showing of decisional conflict. In short, different vote dilution evidence weighed against different state interests for different judicial systems in petitioners' cited authorities vitiates any claim of decisional conflict with the case *sub judice.*

Contrary to petitioners' claim, the Eleventh Circuit's holding is in conformance with this Court's precedent as to (1) the evidentiary weight given to the state's interests in its judicial structure, and (2) that under the particularized set of circumstances, the "totality of the circumstances" factor as to a state's interests *alone* may outweigh evidence of vote dilution in a judicial election case. *Houston Lawyers' Association v. Attorney General of Texas,* 501 U.S. 419 (1991). (See also *Thornburg v. Gingles,* 478 U.S. 30, 45 (1986) establishing that, under a totality of the circumstances analysis, it is not required that any number of factors be proved, and other factors not listed may be relevant.)

STATEMENT OF THE CASE

In preparing a petition for a writ of certiorari, petitioners are admonished that the Statement of the Case

> is the place for accurately summarizing the relevant facts and the treatment accorded those facts by the courts below. The facts to be set forth, moreover, include more than just those favorable to the petitioner's case.... The unfavorable facts, as well as those in dispute (and so labeled), must be given whenever necessary to a proper and full understanding of the case by the Court, but, if possible they should be placed in a context suggesting why they are not controlling. The aim, in short, is to construct a Statement so complete yet succinct, so relevant yet fair, that the Court can be assured that it has the facts essential to a resolution of the petition for certiorari.

Stern, Robert L., et al., *Supreme Court Practice 7th Edition,* Bureau of National Affairs, Inc. (1993).

Petitioners' Statement falls short of this admonition in several respects, thereby requiring respondents to point out those pertinent facts as found by the District Court and the Eleventh Circuit Court of Appeals.[1]

First, petitioners mischaracterize as "severe" the degree of racially polarized voting evidence they submitted (pet. pg. 2) when, in fact, that adjective does not appear in the courts' decisions. See App. at 23a, 90a–92a, 28c–29c.

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1 The lengthy recitation of facts is necessary in order to fully apprise this Court of critical matters considered, evaluated and found, consistent with this Court's admonition that Section 2 cases are fact-intensive, requiring courts to conduct a "searching practical evaluation of the 'past and present reality' " of the challenged electoral process. *Gingles,* 478 U.S. at 45.

Rather, petitioners demonstrated only a strong *inference* of racial vote dilution, app. at 99a, based on evidence of racial bloc voting. App. at 100a. Racial bloc voting, however, is only circumstantial evidence of community racial bias, app. at 62a, and such evidence addresses only the second and third necessary preconditions espoused in *Gingles*. App. at 90a. A defendant may rebut this circumstantial evidence by showing that voting is not based on race. App. at 63a.

These findings are based on the Eleventh Circuit's review of the six elections petitioners offered as proof of a Section 2 violation.[2] App. at 99a–100a. However, in addressing respondents' rebutting evidence, the Court found that incumbency, app. at 20a and 94a, and lack of significant legal experience of one candidate, app. at 95a fn. 85, were non-racial factors in the chosen elections.

Second, petitioners' reference to testimony regarding the futility of additional black candidates running for judicial office (pet. pg. 2) overlooks the District Court's contrary determination on this point:

> There was testimony that a perception exists among the black community that the judicial system is an exclusive white-male club, and that it is difficult for blacks to obtain just treatment in the judicial system. This perception was alluded to by a sitting black circuit judge and a prominent local black attorney. Witnesses also agreed that this perception is erroneous in that the circuit and county judges are fair, be they white or black.

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2 It is noted that the Eleventh Circuit's findings are based on its analysis of election results; yet, the Court rejects petitioners' seminal argument that a violation of Section 2 is established merely by proving numerical differences in representational levels; i.e., disparate election returns. App. at 45a – 46a.

> The Voting Rights Act is not directed to "perceptions" about the "system." Instead, the Act is directed to remedy inequalities in voting where the minority group has less opportunity to participate in the political process and to elect representatives of their choice. Thus, the perception about the judicial system that exists in the black community is irrelevant to this case. *The evidence suggests that it is also inaccurate.* Furthermore,...eligible blacks are actually represented in the judiciary in a greater proportion than eligible blacks are represented in the local bar, *a fact which directly contradicts the minority groups' erroneous perception about the judiciary.* (Emphasis added.)

App. at 44c–45c. The Eleventh Circuit shares this view. App. at 111a.

Third, petitioners' claim that black citizens presently suffer from the past effects of racial discrimination (pet. pg. 4) flies in the face of the District Court's specific findings that "(s)tatistics on political participation indicate that Florida's history of discrimination has no cognizable current impact on black voters' current ability to participate in the political process." App. at 38c. Moreover, "the ability of black voters to participate effectively in the political process for electing circuit and county judges is not materially affected by the continuing socio-economic effects of past discrimination.... (B)lack voters are actually registered at a higher rate than white voters, and there is no evidence to indicate that the lingering effects of discrimination have any material effect on black voter (participation)." App. at 39c–40c.

Fourth, petitioners' claims regarding the size of the election districts, majority vote requirement, numbered-place system,

use of staggered terms, and candidate filing fees were specifically rejected by the District Court.

As to district size, the court found that the districts "are not unreasonably large" and "no showing has been made that the size of these election districts has any adverse effect on black voter turnout.... Similarly, there is no convincing evidence that the size of these election districts impedes black judicial candidates in any material way." App. at 36c.

With regard to majority vote, numbered place, and staggered terms, the District Court specifically found

> that Florida has a valid interest in requiring that a successful judicial candidate gain the support of the majority of the voters. The requirement also works to help black and white incumbent judges remain in office, because the name recognition provided by incumbency provides the incumbent a substantial advantage in gaining majority support.

App. at 37c.

The court further found that

> (t)he use of a numbered place system furthers the State's interest in reducing the number of contested judicial elections, by not pitting incumbent judges against each other in each election. Furthermore, the numbered place requirement helps black and white voters to elect judges of their choice by protecting both black and white incumbent judges when facing a contested election at the expiration of each term.

Id.[3]

As to the costs of running for judicial office, the District Court specifically found that such costs

> are not a significant barrier to prospective black candidates. Because the costs of maintaining a judicial campaign...are small in comparison to most non-judicial elections, the economic disparities between blacks and whites are largely immaterial to the election of circuit and county judges. In addition, the filing fees for judicial candidates are not "enormous"...and can be avoided altogether by a petition method...or can be paid with funds obtained from local lawyers or other sources.

App. at 40c.

The Eleventh Circuit conducted an analysis and made specific findings regarding Florida's partial "Missouri Plan"—a matter omitted from petitioners' Statement of the Case. After explaining how Florida's trial judges are selected under this system, the Court concluded that

> (t)hese changes in Florida's constitution were clearly designed to eliminate the vices of partisan, electoral politics from the process of selecting state court judges. The goal of merit selection of judges, naturally, is to insulate them from popular pressure and to make them more willing to decide an unpopular case fairly and impartially while, at the same time, raising the level of qualifications of judicial officers.

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3 Significantly, the Eleventh Circuit found that black judges, who were appointed to the Jacksonville area judiciary under Florida's merit selection system "roughly in proportion to the number of minority applicants(s)...have enjoyed the same benefits of incumbency as their white counterparts...." App. at 28a-29a.

App. at 13a.

Pointedly, the Court specifically considered the role of race in Florida's creation and maintenance of its current structure for selecting trial judges by finding that

> (r)acial concerns did not inform the creation of Florida's judicial circuits or its counties; nor did race play a role in the State's decision to link the judge's territorial jurisdiction and electoral base and to require the judges to reside within their jurisdictions. Similarly, racial concerns did not prompt the several judicial reforms that have taken place over the past twenty-four years. In the main, those reforms were adopted to remove the judiciary from the evils of party politics, to enhance the independence of the judiciary, and to improve the overall quality of the bench.

App. at 101a–102a.

With these facts properly included in the Statement of the Case, this Court can now readily determine that the Eleventh Circuit's decision is based on the weighing of petitioners' particularized evidence of vote dilution against Florida's specific choice of a partial "Missouri Plan" as analyzed as a matter of law from the foundation of this Court's precedent. The result of that exhaustive, fact-intensive, intensely localized inquiry conforms to this Court's Section 2 jurisprudence, *Gingles,* 478 U.S. at 79; *Houston Lawyers, supra,* and establishes neither decisional conflict, precedential extension, nor the existence of unresolved issues mandating resolution.

REASONS FOR DENYING THE WRIT

By its fact-intensive, intensely localized analysis, the Eleventh Circuit concluded consistent with *Houston Lawyers' Association v. Attorney General of Texas,* 501 U.S. 419 (1991), that under Section 2 of the Voting Rights Act, Florida's interests in maintaining a partial "Missouri Plan" involving at-large elections for trial judges and merit selection nominating commission system for filling vacancies, is sufficiently strong as to outweigh, as a matter of law, whatever evidence of vote polarization petitioners may have shown below. Accordingly, there is neither decisional conflict, an erroneous extension of this Court's precedent, nor are there any unresolved issues of national importance requiring this Court to further explicate the "appropriate standards" already contained in this Court's precedent.

I.

UNDER SECTION 2 OF THE VOTING RIGHTS ACT, FLORIDA'S INTERESTS IN MAINTAINING A PARTIAL "MISSOURI PLAN" INVOLVING AT-LARGE ELECTIONS FOR TRIAL JUDGES AND MERIT SELECTION FOR FILLING VACANCIES, ARE SUFFICIENTLY STRONG AS TO OUTWEIGH, AS A MATTER OF LAW, WHATEVER EVIDENCE OF VOTE POLARIZATION PETITIONERS MAY HAVE SHOWN BELOW.

Petitioners' first argument is based on a flawed view of the Eleventh Circuit's holding that a State's interests in its judiciary operate as an absolute bar to a Section 2 vote dilution claim, regardless of the degree or extent of vote dilution. Once having accepted this erroneous view of the

Eleventh Circuit's decision, petitioners continue their faulty analysis by declaring conflict with *Houston Lawyers' Association v. Attorney General of Texas.* As shown below, petitioners' initial argument is akin to the first in a row of arguments lined up like dominos; when that first argument/domino falls, as it does here, it necessarily knocks down the others.

The bulk of petitioners' argument takes to task Chief Judge Tjoflat's opinion, declaring it in conflict with *Houston Lawyers;* violative of "the strong national interest, expressed in the Voting Rights Act, of eliminating racial discrimination in the election process"; pet. pages 13 and 14, and accusing him of engaging in "speculation" as to remedial possibilities. Pet. pg. 18.[4]

What petitioners overlook in their castigation of several statements in Chief Judge Tjoflat's opinion is that "(t)his Court 'reviews judgments, not statements in opinions,' " *Johnson v. DeGrandy,* 114 S. Ct. 2647, 2653 fn. 5 (1994) (citing *California v. Rooney,* 483 U.S. 307 (1987)). Accordingly, "(t)he State is entitled to 'urge any grounds which would lend support to the judgment below,' " *id.,* quoting *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 419 (1977).

The "judgment" is the Eleventh Circuit's affirmance of the District Court's decision concluding that Florida's interests in maintaining its partial "Missouri Plan" for judicial selection, as a matter of law, outweighs petitioners' vote polarization evidence submitted in the form of six elections chosen by them. App. at 113a. Thus, the Eleventh Circuit's judgment,

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4 It is interesting to note that after petitioners criticize Chief Judge Tjoflat for engaging in "speculation", they conclude their argument by declaring his statement regarding a "system of separate justice" as being wrong, relying wholly on matters not embraced in the record of this cause and therefore of some degree of speculation itself. Pet. pg. 20.

rather than being in conflict with *Houston Lawyers,* as petitioners contend, is in fact wholly in harmony with that decision because that case specifically recognizes that a state's interests in its judiciary may be sufficiently strong so as to outweigh whatever evidence of vote dilution offered by a plaintiff. 501 U.S. 426; app. at 113a (pet. pgs. 27-28); *League of United Latin American Citizens (LULAC) v. Cle*ments, 999 F.2d 831, 870 (5th Cir. 1993) *(en banc), cert denied,* 114 S. Ct. 878 (1994).

That the Eleventh Circuit's decision conforms to *Houston Lawyers* is further demonstrated by recognizing and applying certain truths which are readily distilled from Section 2 jurisprudence.

First, such litigation is intensely fact-based and case-specific wherein a plaintiff must establish the three necessary preconditions as a threshold, and then go forward and prove its case by meeting the "totality of the circumstances" standard. *Johnson v. DeGrandy,* 114 S. Ct. at 2657; app. at 37a–40a. The subject of racially polarized voting is addressed initially by numbers two and three of the necessary preconditions. The failure to meet all three preconditions precludes the necessity for a totality of the circumstances analysis. When the totality factors are analyzed, no one factor is more preclusive of any other. In other words, the list of totality factors is not exhaustive; it is not required that any particular number of these factors be proved, and there may be other factors that are not listed which are relevant. *Gingles, supra.* Second, with respect to judicial elections, there is an additional factor—the state's particularized interests in maintaining its judiciary. *Houston Lawyers' Association, supra.* Third, the issue of a state's interests in its judiciary is a legal one for the court to resolve. *LULAC,* 999 F.2d at 871.

From the above, it is possible that, as a matter of law, a state's interests in maintaining its judiciary will outweigh a vote dilution claim, depending upon the relative weight of the state's interests and the relative weight of the particularized vote dilution evidence. This type of intensely localized analysis, undertaken by the Eleventh Circuit, is in strict harmony with this Court's Section 2 jurisprudence as it relates to judicial elections. *Houston Lawyers; LULAC.*

While it is true that this Court, in *Houston Lawyers' Association,* concluded that a state's interests in maintaining its particular judicial structure "is merely one factor to be considered in evaluating the 'totality of circumstances,' (and) that interest does not automatically, and in every case, outweigh proof of racial vote dilution[,]" 501 U.S. at 427, it is equally true, as noted above, "that the state interest *could* outweigh what would otherwise be proof of an illegal dilution and thus foreclose liability." *LULAC,* 999 F.2d at 870.

Indeed, *Houston Lawyers* specifically recognizes that a state's interests in its judiciary alone may preclude a vote dilution claim and, even where such a claim is made, may preclude a remedy that involves redrawing boundaries. *Houston Lawyers,* 501 U.S. at 426, pet. pgs. 27-28. Therefore, while under both *Houston Lawyers* and *LULAC* a state's interests in maintaining its judiciary will not automatically outweigh proof of racial vote dilution, these cases recognize that, depending upon the relative weight of the state's interests and the evidence of vote dilution, the state's interests alone may be sufficiently strong so as to overcome a vote dilution claim; it may thus be the most significant or even the determinative factor, again depending upon the strength of the interests and weakness of vote dilution evidence.

The record in this case demonstrates that the latter is precisely what has occurred here; the Eleventh Circuit,

upon review of petitioners' vote dilution evidence, found that the evidence was not sufficiently strong to overcome Florida's strong interests in its partial "Missouri Plan." The Eleventh Circuit's analysis of the state's interests as against petitioners' vote dilution evidence led that Court to conclude that, as a matter of law, petitioners had not made out a Section 2 violation. This stands in stark contrast to petitioners' bold—and erroneous—assertion that the Eleventh Circuit blindly rejected petitioners' vote dilution claim solely because the state offered only a self-serving interest supportive of its judicial structure.

The Eleventh Circuit spent a considerable amount of judicial labor discussing Florida's judiciary. *See* Statement of the Case and app. at 10a-13a. The Eleventh Circuit, consistent with *LULAC,* resolved the legal question by weighing the state's interests in its partial "Missouri Plan" against the evidence petitioners submitted during trial, and concluded that Florida's interests outweigh whatever evidence petitioners presented to the District Court.

Because *Houston Lawyers' Association* does not foreclose a court's finding that the substantiality of a state's interests may outweigh the particularized vote dilution evidence presented in a given case (and, in fact, *Houston Lawyers' Association* recognizes that there may well be cases in which the state's interests alone will be sufficient to outweigh a plaintiff's vote dilution evidence), the Eleventh Circuit's en banc decision is in harmony with *Houston Lawyers' Association, LULAC,* and *Gingles.*

The facts set out above are case-specific and intensely localized; the legal principles applied to these facts are clearly derived from this Court's precedent. There is no dispute between the Eleventh Circuit and District Court that Florida's interests in its judiciary outweigh petitioners'

evidence of vote dilution. App. 7a–13a, 103a–112a, 23c–26c, 45c–46c.

Petitioners' argument thus is without merit.

II.

THE ELEVENTH CIRCUIT'S PARTICULARIZED HOLDING AS TO THE WEIGHT ACCORDED FLORIDA'S PARTIAL "MISSOURI PLAN" FOR JUDICIAL SELECTION DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT, OR OTHER FEDERAL CIRCUIT AND DISTRICT COURTS.

The analysis in Part I above demonstrates that petitioners' claim of conflict with this Court's precedent, as well as decisions of other federal circuit and district courts, is without foundation. The Eleventh Circuit's state interests analysis is essentially the same as was involved in *Houston Lawyers' Association,* app. at 101a, with the caveat that Florida's partial "Missouri Plan" eliminates partisan judicial elections, whereas Texas's system calls for partisan election of judges. Thus, Florida's interests in its particularized judiciary are even stronger than those asserted in *Houston Lawyers' Association* because of the elimination of partisanship. App. at 101a–102a. In fine, none of the cases cited by petitioners as being in conflict with the Eleventh Circuit's decision deals with the same quantum of evidence weighed against the same state interests as the case at bar. Because of different vote dilution facts weighed against different judicial structures and the state interests supporting them in petitioners' cited authorities, those cases are distinguishable from, and therefore cannot be in conflict with, the Eleventh Circuit's decision here.

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III.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT ADDRESS ANY PRECLUSIVE EFFECT OF A SECTION 2 REMEDY IN THE CASE *SUB JUDICE;* ACCORDINGLY, THE COURT'S DISCUSSION OF *HOLDER V. HALL,* 114 S.CT. 2581 (1994) AFFORDS PETITIONERS NO SOLACE HERE.

Petitioners take issue with Chief Judge Tjoflat's analysis of *Holder v. Hall.* However, a careful reading of Judge Edmondson's concurring opinion demonstrates that Chief Judge Tjoflat's analysis does not represent the decision of the Court. Additionally, the discussion reiterates that a consideration of the state's interests in its judicial structure is important at both the liability and remedy stages, app. 94a; that this consideration cannot be separated. App. 76a.[5]

The concurring judges understand that the holding of the case is contained in Part V of the opinion, app. at 103a–112c; part V, however, contains only a discussion of the deficiencies of petitioners' suggested remedies; it does not contain Chief Judge Tjoflat's discussion of *Holder v. Hall* which appears in Part III of the decision.

The Court's discussion of the remedial deficiencies only buttresses the Court's ultimate decision. This is so because when these deficiencies are added to Florida's heightened interests in its judicial system and balanced against petitioners' vote polarization evidence, the propriety of the Eleventh Circuit's rejection of petitioners' Section 2 claim is evident.

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5 Pointedly, this Court, in *Houston Lawyers,* specifically found that the state's interests in its judiciary "are relevant" at *either* the liability or remedy stages, 501 U.S. at 426.

Because the Eleventh Circuit did not find a Section 2 violation under *Gingles* and *DeGrandy,* nothing in the decision purports to hold that petitioners established a Section 2 violation for which there can be no remedy.

Indeed, woven throughout the Eleventh Circuit's decision is the rejection of the *sine qua non* of petitioners' claim that racially disparate vote totals *ipso facto* presupposes both the three necessary preconditions and enough of the totality standard so as to make out a voting rights violation, app. 45a–46a, thereby requiring a state to alter its judiciary based solely on racial considerations. The Eleventh Circuit never held that petitioners met the totality requirements; rather, the Court found only evidence of disparate elections results—evidence that the Court itself rejected. *Id.*

Thus, petitioners' continued disagreement with certain statements in Chief Judge Tjoflat's opinion offers them no solace here. *Johnson v. DeGrandy, supra.*

IV.

THERE ARE NO UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE TO FLORIDA'S PARTIAL "MISSOURI PLAN" REQUIRING FURTHER ELUCIDATION BY THIS COURT.

Petitioners contend that there remains unresolved the question of whether the state's interests in its judiciary are relevant at the liability stage or at the remedy stage. As demonstrated in Part III above, this Court has already determined that this inquiry is relevant at either stage. Of equal import, however, is that by asking this Court to address this issue, petitioners actually seek an advisory

opinion. This is so because, based on the evidence they presented at trial as against the interests Florida has in its partial "Missouri Plan" method of judicial selection, the Eleventh Circuit, in harmony with *Houston Lawyers* and *LULAC,* found that as a matter of law, petitioners did not make out a vote dilution claim regardless of when the state interests are examined. Therefore, for the purpose of the case *sub judice,* it makes no difference when the analysis was undertaken for, as Judge Edmondson points out in his concurring opinion:

> The State of Florida's legitimate interest in maintaining linkage between jurisdiction and the electoral basis of its trial judges [under its partial "Missouri Plan"] is, as a matter of law, great and outweighs *(either at the vote-dilution-finding stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here.* (Emphasis supplied.)

App. at 113a.

As noted above, this Court's Section 2 jurisprudence holds that, depending upon the particularized facts of a given case, the state's interests in maintaining its judiciary may outweigh the particular evidence presented of vote dilution. *Houston Lawyers.* This is precisely what occurred in the case *sub judice.* No broad principles were espoused; the Court simply applied the facts presented by petitioners below to the law as articulated by this Court. In this light, it is unnecessary to accept petitioners' request for an advisory opinion.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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